

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF
AMERICA,

Plaintiff/Respondent,

v.

GARY L. ROGERS,

Defendant/Movant.

Case Nos. EDCV 14-02292-VAP
EDCR 12-00057-VAP

**ORDER DENYING MOTION FOR
RELIEF UNDER 28 U.S.C.
§ 2255**

**[Motion filed on November 6,
2014]**

I. SUMMARY OF PROCEEDINGS

On November 6, 2014, Gary L. Rogers ("Movant") filed a "Motion" which the Court construes as a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct A Sentence by a Person in Federal Custody. ("Motion" or "Mot.") ([Crim.] Doc. No. 467; [Civ.] Doc. No. 1)¹. On December 3, 2014, the United States filed an Opposition

¹ Some of the documents filed in connection with this Motion appear only on the docket in the underlying criminal case, CR 12-00057-VAP-3. Citations to [Civ.] indicate documents on the docket for this Motion. Citations to [Crim.] indicate documents on the docket for the underlying criminal case.

1 ("Opp'n") to the Motion. ([Crim.] Doc. No. 471.) Movant
2 filed a Reply to the Government's Opposition on
3 February 5, 2015. ([Crim.] Doc. No. 474; [Civ.] Doc. No.
4 12.)

5 6 **II. BACKGROUND**

7 On December 4, 2013, Movant pled guilty to Count One
8 of the First Superseding Indictment, conspiracy to commit
9 sex trafficking, in violation of 18 U.S.C. § 1594(c).
10 (Minutes of Change of Plea Hearing ([Crim.] Doc. No. 339)
11 at 1; Plea Agreement ([Crim.] Doc. No. 248) at 1-2.)
12 Movant entered his guilty plea pursuant to a written plea
13 agreement. (See Plea Agreement.)

14
15 On April 11, 2014, the Court sentenced Movant to a
16 204 month term of imprisonment, along with a 5 year
17 period of supervised release. (J. & Commitment Order
18 ([Crim.] Doc. No. 424).) On April 24, 2014, Movant filed
19 a letter with the Court, in violation of Local Rule 83.2-
20 11. ([Crim.] Doc. No. 432.) That letter was not filed,
21 but was instead rejected for violating the Local Rules.
22 In the letter, Movant expresses his displeasure with his
23 sentence and requests permission to file motions pursuant
24 to Federal Rules of Criminal Procedure 29, 33, and 35(a).
25 Despite the fact that nowhere does the letter mention an
26
27
28

1 appeal, according to Movant, this letter was a "direct
2 appeal." (Reply at 2.)²

3
4 After his letter had been rejected for filing, on
5 June 26, 2014, Movant mailed a handwritten letter with
6 attachments to Government counsel, who in turn lodged
7 those documents with the Court. ([Crim.] Doc. No. 445.)
8 Along with the handwritten letter was a document titled
9 "Notice of Appeal." ([Crim.] Doc. No. 445-1.) As far as
10 the Court can discern, no direct appeal was ever properly
11 filed with the Clerk and no direct appeal was considered
12 by the Ninth Circuit.

13
14 On November 6, 2014, Movant filed the instant Motion.
15 Construing the Motion liberally, it asserts three claims
16 for relief under § 2255:

17
18 (1) Movant's counsel was ineffective because he
19 failed to submit evidence that Movant suffered
20 from multiple mental disabilities at the time he
21 committed the crime;

22 (2) Movant did not have access to a law library
23 before he signed the Plea Agreement;

24
25
26
27 ² The pages of the Reply are not numbered. The
28 Court refers to the pages of the Reply sequentially in
the order they appear in the ECF system.

1 (3) Movant was convinced to sign the Plea Agreement
2 based on counsel's representation that he would
3 receive a sentence lower than 204 months.

4
5 (Mot. at 6, 9-10, 13.)
6

7 III. LEGAL STANDARD

8 Section 2255 authorizes the Court to "vacate, set
9 aside or correct" a sentence of a federal prisoner that
10 "was imposed in violation of the Constitution or laws of
11 the United States." 28 U.S.C. § 2255(a). Claims for
12 relief under § 2255 must be based on some constitutional
13 error, jurisdictional defect, or an error resulting in a
14 "complete miscarriage of justice" or in a proceeding
15 "inconsistent with the rudimentary demands of fair
16 procedure." United States v. Timmreck, 441 U.S. 780,
17 783-84 (1979). If the record clearly indicates that a
18 movant does not have a claim or that he has asserted "no
19 more than conclusory allegations, unsupported by facts
20 and refuted by the record," a district court may deny a §
21 2255 motion without an evidentiary hearing. United States
22 v. Quan, 789 F.2d 711, 715 (9th Cir. 1986); see also
23 United States v. Chacon-Palomares, 208 F.3d 1157, 1159
24 (9th Cir. 2000) ("When a prisoner files a § 2255 motion,
25 the district court must grant an evidentiary hearing
26 '[u]nless the motion and the files and records of the
27
28

1 case conclusively show that the prisoner is entitled to
2 no relief.'" (quoting 28 U.S.C. § 2255)).

3 4 IV. DISCUSSION

5 A. Movant's Claims of Ineffective Assistance of Counsel 6 Are Without Merit

7 Movant claims his counsel was ineffective for: (1)
8 failing to submit evidence that Movant suffered from
9 mental disabilities at the time he committed the crimes
10 that formed the factual basis for his conviction and (2)
11 convincing Movant to sign the Plea Agreement based on the
12 representation that he would receive a sentence lower
13 than 204 months. Though the Plea Agreement contains a
14 broad waiver of appeal, claims related to ineffective
15 assistance of counsel cannot be waived. See United
16 States v. Pruitt, 32 F.3d 431, 432-33 ("We doubt that a
17 plea agreement could waive a claim of ineffective
18 assistance of counsel based on counsel's erroneously
19 unprofessional inducement of the defendant to plead
20 guilty or accept a particular plea bargain."); Washington
21 v. Lampert, 422 F.3d 864, 871 (9th Cir. 2005) (finding
22 that waivers cannot bar ineffective assistance of counsel
23 claims associated with the negotiation of plea
24 agreements).³

25 _____
26 ³ To the extent Movant did not raise these claims
27 on direct appeal, if his claims of ineffective assistance
28 of counsel had merit, those claims would not be
procedurally barred. Massaro v. United States, 538 U.S.

(continued...)

1 To establish ineffective assistance of counsel, a
 2 defendant must prove: (1) "counsel's representation fell
 3 below an objective standard of reasonableness," and (2)
 4 there is a reasonable probability that, but for counsel's
 5 errors, the result of the proceeding would have been
 6 different." Strickland v. Washington, 466 U.S. 668,688,
 7 694 (1984). The "likelihood of a different result must
 8 be substantial, not just conceivable." Harrington v.
 9 Richter, 562 U.S. 86, 112 (2011).

10
 11 **1. Counsel's Submission of Evidence Concerning**
 12 **Movant's Mental Disabilities**

13 Movant first argues that his counsel was ineffective
 14 because he failed to present evidence that "at the time
 15 of the crime, [Movant] was diagnosed with multiple mental
 16 [disabilities]," which was confirmed by various mental
 17 health reports and by the fact that Movant received
 18 social security income. (Mot. at 6.)

19
 20 The record belies this contention, however. At the
 21 sentencing hearing on April 11, 2014, the Court discussed
 22 Movant's history and characteristics, noting that he

23
 24 _____
 25 ³(...continued)
 26 500, 504 (2003) ("failure to raise an ineffective-
 27 assistance-of-counsel claim on direct appeal does not bar
 28 the claim from being brought in a later, appropriate
 proceeding under § 2255."); Murray v. Carrier, 477 U.S.
 478, 492 (1986) ("Attorney error short of ineffective
 assistance of counsel does not constitute cause for a
 procedural default . . .").

1 suffered from depression and that he had previously been
2 diagnosed with bipolar disorder and schizophrenia. The
3 Court confirmed with defense counsel that there was no
4 reason to believe that Movant was incompetent to proceed,
5 however.

6
7 After taking into consideration the seriousness of
8 the offense, the need for deterrence, and Movant's
9 history of mental health issues, the Court sentenced him
10 to 204 months incarceration. In so doing, the Court
11 specifically referenced Movant's history of depression as
12 a mitigating factor in determining that the given
13 sentence was appropriate.

14
15 Moreover, Movant's counsel also referenced his
16 history of depression, schizophrenia, and bipolar
17 disorder in arguing for a reduced sentence. Movant
18 himself discussed his diagnosis of bipolar disorder and
19 schizophrenia in his allocution.

20
21 Thus, upon review of the record, it is clear that
22 Movant's mental health history known to the Court at the
23 time of sentencing, and that the Court considered his
24 mental health history in determining the appropriate
25 sentence. As Movant's counsel was aware of Movant's
26 mental health history and relied upon that history in
27 arguing for a reduced sentence, Movant's first ground for
28

1 relief has no basis and is belied by the record. Put
2 another way, Movant's counsel could not have been
3 ineffective for doing something Movant faults him for
4 failing to do. Accordingly, the Court DENIES the Motion
5 on this ground.

6
7 **2. Counsel's Alleged Representation that**
8 **Movant Would Receive a Sentence Lower**
9 **than 204 Months**

10 The Plea Agreement signed by Movant contained an
11 appeal waiver stating that, "provided the Court imposes a
12 total term of imprisonment on all counts of conviction of
13 no more than 240 months, [Movant] gives up the right to
14 appeal," inter alia, the calculation of his sentence and
15 the term of imprisonment imposed by the court. (Plea
16 Agreement ¶ 18.)

17
18 Movant now contends his counsel told him that he
19 would not "get 204 months for this [conviction]" because
20 his "factual basis [was] barely even federal"
21 (Mot. at 13.) Thus, Movant is arguing that he was
22 induced to enter into the plea agreement based on his
23 counsel's representation that he would receive a sentence
24 below 204 months. In his Reply, Movant asserts that, had
25 he known everything "[defense counsel] told me was
26 [false], I would have went to [trial]." (Reply at 4.)

1 There is reason to doubt Movant's claim that his
2 attorney told him that he specifically would not receive
3 a 204 month sentence. As noted by the Government, a term
4 of imprisonment of 204 months was not requested by either
5 party or recommended by the United States Probation
6 Office. (Opp'n at 17.) It therefore seems unlikely that
7 defense counsel, despite requesting a sentence of 120
8 months, was prescient enough to divine the Court's
9 intended sentence prior to the sentencing hearing and
10 also opine to Movant that he would receive a sentence
11 lower than that term.

12
13 The Court finds Movant's statements at the change of
14 plea hearing more credible than the conclusory
15 allegations asserted in the Motion. During the change of
16 plea hearing, the Court asked Movant if "[a]nybody made
17 any promises to you about your case or told you anything
18 about it or guaranteed you anything about it other than
19 what's in the plea agreement?" Movant responded in the
20 negative. Similarly, the Court asked defense counsel
21 "other than what's contained in the written plea
22 agreement have there been any other promises[,]
23 representations[,]
24 or guarantees made to either you or
25 your client," to which he also responded in the negative.

26 Later in the plea colloquy, the Court asked
27 Government counsel to state the longest possible sentence
28

1 the law allowed if Movant should choose to go to trial;
2 Government counsel stated the longest possible sentence
3 was life imprisonment. Thereafter the Court told Movant
4 that "if your sentence is longer than what you hoped for
5 or expected, you'll still be bound by your guilty plea
6 and you won't have the right to withdraw it because it's
7 not the sentence you hoped for." Movant responded that
8 he understood.

9
10 The Court also asked Movant if, aside from general
11 discussions with his counsel about the sentencing
12 guidelines, if "anyone had promised [him] a certain
13 sentence if [he] pled guilty" or if "anyone told [him]
14 exactly what [his] sentence would be," to which he
15 responded in the negative. Movant also affirmed that he
16 understood everything that had been discussed during the
17 hearing, that he understood the consequences of pleading
18 guilty, that he was competent and able to make the
19 decision to plead guilty, that his decision to plead
20 guilty was entirely voluntary on his part.

21
22 To the extent the Movant argues that counsel promised
23 him a sentence of 204 months, the Court finds those
24 allegations have little weight in light of his statements
25 at the change of plea hearing. See Blackledge v.
26 Allison, 431 U.S. 63, 74 (1977) ("[S]olemn declarations
27 in open court carry a strong presumption of verity."). A
28

1 district court may deny a § 2255 motion if the petitioner
2 asserts "no more than conclusory allegations, unsupported
3 by facts and refuted by the record." See United States
4 v. Chacon-Palomares, 208 F.3d 1157, 1159 (9th Cir.
5 2000)(quoting 28 U.S.C. § 2255).

6
7 Moreover, even assuming that Movant's allegations
8 concerning his counsel's representations were true,
9 Movant has failed to show he was prejudiced. When
10 assessing "the petitioner's claim that ineffective
11 assistance led to the improvident acceptance of a guilty
12 plea, the Court [has] required the petitioner to show
13 'that there is a reasonable probability that, but for
14 counsel's errors, [the defendant] would not have pleaded
15 guilty and would have insisted on going to trial.'"
16 Lafler v. Cooper, 132 S. Ct. 1376, 1384-85 (2012).
17 Movant has made no such showing here.

18
19 Simply put, Movant signed a plea agreement in which
20 he agreed that he would waive his right to appeal if he
21 received a sentence of up to 240 months; he was also told
22 that his plea would be valid and binding even if the
23 sentence he received was not what he had hoped for or
24 expected. He cannot now complain about the length of his
25 sentence, which was lower than highest sentence he could
26 have received under the Plea Agreement.

1 Thus, the Court finds that defense counsel was not
2 ineffective with respect to Movant's acceptance of the
3 Plea Agreement and his subsequent guilty plea, and that
4 Movant has suffered no prejudice. Accordingly, the Court
5 DENIES the Motion inasmuch as it claims Movant's counsel
6 was ineffective.

7
8 **B. Movant's Remaining Claim Regarding His Ability to**
9 **Have Access to a Law Library Fails**

10 Finally, Movant attempts to excuse his procedural
11 default by claiming that he had no access to a law
12 library until one and one half years after he signed the
13 Plea Agreement. (Mot. at 9.) Movant further explains
14 that the facility in which he was housed had no law
15 library.

16
17 This claim also fails. As noted by the Government,
18 there is no "abstract, freestanding right to a law
19 library or legal assistance, [and] an inmate cannot
20 establish relevant actual injury simply by establishing
21 that his prison's law library or legal assistance program
22 is subpar in some theoretical sense." Lewis v. Casey,
23 518 U.S. 343, 351 (1996). Rather, "the inmate . . . must
24 go one step further and demonstrate that the alleged
25 shortcomings in the library or legal assistance program
26 hindered his efforts to pursue a legal claim." Id.

